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In The Supreme Court of The United States

October Term, 1959

UNITED STATES OF AMERICA,

Appellant,

vs.

LUCILLE ALDINE DEGE and
ERNEST DEGE,

Appellees

BRIEF OF APPELLEES

THOMAS WHELAN
411 Orpheum Building
San Diego 1, California

Attorney for Appellees

J. ROBERT O'CONNOR,
4th Floor
U. S. Grant Building
San Diego 1, California

Of Counsel

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1959

No. 14

UNITED STATES OF AMERICA,

Appellant,

v.

LUCILLE ALDINE DEGE and
ERNEST DEGE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES

STATEMENT OF THE RECORD

The brief of appellant, United States of America, correctly states the jurisdiction (P. 1); the question involved (P. 2); and the proceedings in the Court below (P. 3-4) - except that:

The Indictment (R. 2-3-4-) sets forth ten separate overt acts alleged to be pursuant to and to effect the objects of the alleged conspiracy (R. 3-4), numbers 2, 3, 5, 7 and 10 of which, if true and provable, conclusively show that the Indictment need not have been drawn and returned against appellees alone, but others, either as defendant conspirators or unindicted co-conspirators, could have been named as participants in the alleged conspiracy, thus avoiding the question appellant raises on this appeal.

ARGUMENT

Appellees concede that appellant has presented a scholarly and well written brief. Appellant's brief shows the expenditure of much time, considerable research as well as effort and ingenuity in its preparation. Appellees cannot agree with the conclusions reached by appellant, and respectfully suggest that by this appeal, appellant seeks:

I

JUDICIAL LEGISLATION

Appellees respectfully suggest that appellant desires judicial legislation by this Honorable Court when

it should be apparent to everyone in the Department of Justice that the remedy the Government seeks should be sought from the Congress.

On pages 30-31 of appellant's brief it is stated:

> "The conspiracy statute, moreover, plays a particularly important part in federal criminal law since there is no general statute making attempt a crime, and many acts which would amount to attempts in other jurisdictions are punishable under federal law, if the crime is prevented from reaching fruition, only as conspiracies. Thus in federal law it is especially important that the conspiracy statute apply to all persons who conspire to commit a crime whether or not they happen to be husband and wife."

This is the theme of appellant's brief, see page 6 where it is stated:

> "Since there is no general federal attempt statute - that function being largely performed by the conspiracy statute - immunizing husband and wife from liability for conspiracy as such in effect simply frees them from punishment unless their conspiracy is successful."

Is there anything wrong with Congress enacting legislation which would make an attempt to commit a crime a public offense, defining an attempt and declaring a penalty for an attempt?

Is such legislation a problem for the Congress?

Is such legislation a problem for the Supreme Court of the United States?

In holding contrary to the appellant's (Government's) contention here, the Ninth Circuit in Dawson v. U.S., 10 Fed. 2d 106 at 108, (Certiorari denied 271 U.S. 687), says:

> "A rule so well established and so generally recognized by the modern authorities should not be judicially repealed."

If the legislature has not specifically declared a crime the Court may not enlarge the reach of enacted crimes and thus seize an unwarranted jurisdiction.

See U.S. v. Hudson and Goodwin, 7 Cranch 32 3 L. Ed. 259; (cited in) Morissette v. U.S., 72 S.C. 240, 249-250 - 342 U.S. 246.

II

EX POST FACTO LAW

In California, at least since People v. Miller (1889) 82 Cal. 107, husband and wife alone can not be guilty of a conspiracy in violation of state law. In 1933, in People v. MacMullen, 134 Cal. App. 81, 85, Justice Burroughs takes a kick at People v. Miller, and suggests among other things: "the question merits further consideration by that (Supreme) Court or by the legislature". The California legislature has not seen fit to declare by statute that husband and wife alone can be guilty of the crime of conspiracy under state law; The California

Supreme Court denied a hearing in People v. McMullen.

In the area of the Ninth Circuit at least since Dawson v. United States, 10 Fed. 2d 106, (Certiorari denied, 271 U.S. 687), and Gros v. United States, 138 Fed. 2d 261, a husband and wife alone are incapable of engaging in a criminal conspiracy in violation of the laws of the United States.

For this Honorable Court to reverse the trial Court, and the cases upon which the trial Court's decision rested, would not only be in effect judicial legislation on the part of this Honorable Court - but would have the effect of saying now that appellees are guilty of a crime for doing in 1957 and 1958 acts which have been considered not unlawful since Dawson in 1926, and the lawfulness of which have never been questioned in the area of the Ninth Circuit since Gros in 1943.

In effect appellant asks this Honorable Court to declare, then affirm an ex post facto law.

For the Congress to enact legislation now making criminal the acts of appellees during 1957-1958 would be in violation of subsection 3, Section 9, Article 1, U.S. Constitution.

Will the Supreme Court at the behest of the appellant Government circumvent that same provision of the Constitution?

FURTHER DISCUSSION

NINTH CIRCUIT SHOULD BE UPHELD

Appellees urge that the rule of the Ninth Circuit should be upheld, not only because the sustaining of that rule will have such a profound and lasting effect upon their personal fortunes, but because it is the correct rule based upon precedent, history, morals, sound reasoning and because the continuation of that rule will of necessity protect and preserve family ties - and the preservation of families and the family relationship is the strongest rock upon which the preservation of our nation - our form of Government - is built.

THE RULE OF THE NINTH CIRCUIT IS:

Husband and wife alone are incapable of engaging in a criminal conspiracy in violation of Federal Law.

Dawson v. U.S., 10 Fed. 2d 106
(Rehearing denied 271 U.S. 687)

Gros v. U.S., 138 Fed. 2d 261

THE CONTRARY RULE

The rule of the Court of Appeals for the District of Columbia Circuit and for the Fifth Circuit is found in:

Johnson v. U.S., 157 Fed. 2d 209
Thompson v. U.S., 227 Fed. 2d 671

Kivette v. U.S., 230 Fed. 2d 749

Wright v. U.S., 243 Fed. 2d 569

all cited in appellant's brief.

The last three decisions are based principally, if not entirely, upon Johnson v. U.S., (supra) where it is said:

> "The old rule was based on the common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts and torts in the District of Columbia. * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action." (Emphasis added)

Apparently the Court of Appeals based its conclusion because of the acts of Congress legislating with reference to affairs within the District of Columbia, only. To use the Court's own language - "No reason remains" to believe otherwise.

The rule of the Ninth Circuit finds support in the California rule expressed by the Supreme Court of California in the Miller case, and by the refusal of that Court to grant a hearing in the MacMullen case.

THE "ONENESS" THEORY

Appellant spends from page 10 forward of its 36 page brief to point out that the "oneness" or unity theory can no longer be supported by its historical basis (P. 10); and that no modern policy considerations support the rule.

Appellant points out that the doctrine had a Biblical origin - Is that bad?- and from that source passed into the English law as a maxim describing the marital relationship (P. 10-11).

On page 16 under a headnot appellant says: "The theory of marital "oneness" was not really accepted even in the English Common Law."

Appellees have commented on the effort, the research, skill and ingenuity of the author of appellant's brief - but it seems to appellees that the author in some instances reasons incorrectly from a true premise to a false conclusion; at other times reasons incorrectly from a false premise to an equally false conclusion.

"ONENESS" THEORY RECOGNIZED BY CONGRESS AND SUPREME COURT

Even if the "oneness" theory was not really accepted in the English common law, it has been accepted by the Congress of the United States.

This is not appellees' construction of the Expatriation Act of 1907 - it is the construction of this Honorable Court:

In Perez v. Brownell, 72 S. C. 568 at 572, this Court in referring to MacKenzie v. Hare, 239 U.S. 299, 36 S.C. 106, 60 L. Ed. 297, said:

> "The Court, through Mr. Justice McKenna, after finding that merging the identity of husband and wife, as Congress had done in this instance, had 'purpose and, it may be, necessity, in international policy' ----."

In MacKenzie v. Hare, 239 U.S. 299 at 311, Mr. Justice McKenna said:

> "The identity of husband and wife is an ancient principle of our jurisprudence."

THERE IS MODERN POLICY CONSIDERATION FOR SUPPORT OF RULE

This Honorable Court has stated in a decision of this Court as recently as 1958, that it should be the policy of the law to encourage the cementing of family relationships and to promote harmonious relationships between husband and wife.

In Hawkins v. U.S., 358 U.S. 74 at 77, this Honorable Court speaking of the rule barring testimony of one spouse against the other, has this to say:

> "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit

> of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now."

and, at page 79

> "----- there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned."

PUBLIC POLICY INVOLVED

Every philosopher, teacher, educator, historian and lawmaker down through the years, down through the centuries has recognized that the stability of the home, the stability of the family, has been the backbone of established government.

Any attempt on the part of Government to interfere with the stability of the home and family will be of fatal tendency.

With the thought of the threat of Communism memory goes back to the days following World War One. Those who had overthrown the Czarist Government and were in charge of affairs in Russia were called Bolsheviks, and when the question in the minds of most people was: "Must we fear Bolshevism?" an address

was delivered in the auditorium of Creighton University, Omaha, Nebraska, by quite an American, Edward H. Whelan, now deceased, but a lawyer, soldier, author and patriot, who then made the declaration:

> "The greatest foe of, and bulwark against Bolshevism in this country today is the Irishman, the Irishman's wife, the Irishman's family, and the Irishman's Church."

These remarks true then, truer now, illustrate appellees' contentions.

This reference is not made in support of any particular religion - but in support of all religions who profess a belief in a Supreme Being . Appellees (Dege) have no particular religion.

THE RESULTANT CONFUSION

Should this Honorable Court sustain the appellant's contentions,what effect would this decision have when considered with the rule in Hawkins v. U.S., supra?

Imagine a situation where a husband and wife were indicted in one indictment, one count of conspiracy charging both husband and wife, and the husband charged with three separate counts, each one charging a distinct substantive offense. On the trial the husband elected to remain off the witness stand and the wife, with a perfectly valid defense to the charge of conspiracy cannot justify herself without giving evidence against her husband, and the husband objects to the wife's testimony

under the rule in Hawkins v. U.S.

THE APPELLANT'S DREAM

It is just that - appellant at several parts of its brief anticipates trouble if its contention is upheld -

At page 5 of appellant's brief the following appears:

> "The arguments stressing the unique nature of the crime of conspiracy and the unlikelihood of an arms-length agreement between husband and wife likewise would justify at most only the imposition of more rigid standards of proof and not a complete immunity."

again at page 29:

> "In our view these reasons relate, at best, to the quantum of proof which should be required in a conspiracy charge against husband and wife and do not justify a rule that never, under any circumstances, may a husband and wife be guilty of conspiracy."

But appellant's real uncertainty appears on page 33 as follows:

> "Proof may in some cases be difficult. In some circumstances, the evidence will not show a true agreement between the spouses. It may turn out that the weaker spouse, whether

husband or wife, was controlled by the stronger. Perhaps, to protect against unwarranted convictions in those situations, a rebuttable presumption against independence of action should be indulged in. Obviously, also, no inference of conspiracy could be drawn from a mere showing of constant association between husband and wife, as it might be from proof of constant clandestine meetings among strangers, and precautionary instructions to that effect might be appropriate. However, the possible need of more protective evidentiary safeguards in the trial of a husband and wife for conspiracy should not affect decision of the sole question posited here, i.e., whether they can be charged with that offense."

From the quoted portion of appellant's brief it is apparent that the appellant is not quite sure of what appellant expects of this Honorable Court. As Appellees read it, a logical ruling on the part of this Honorable Court would be to affirm the trial Court.

CONCLUSION

Because a reversal of the order of the trial Court would constitute:

1. The adoption of Judicial legislation.

2. What in principle would be ex Post Facto legislation.

3. A change in established Precedent.

4. A disavowal of a principle established by Congress and approved by this Honorable Court.

5. A violation of established Public Policy.

6. Confusion as to Procedures and Rules on admissibility of evidence

it is urged that the order of the trial Court be sustained.

Respectfully submitted,

THOMAS WHELAN

Attorney for Appellees

J. ROBERT O'CONNOR
Of Counsel

October, 1959